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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES OF AMERICA,
Appellant
v.
HUBERT L. WILL, et al.,
Appellees

On Appeals from the United States District Court for the Northern District of Illinois

Brief of Amicus Curiae Los Angeles County Bar Association in Support of Appellees

Of Counsel:

Joseph D. Mandel
Richard M. Coleman
Roy H. Aaron
Gavin Miller
Georgia Franklin
617 South Olive Street
Los Angeles, CA 90014

Officers of the Los Angeles County Bar Association

Munger, Tolles & Rickershauser
612 South Flower Street
Los Angeles, CA 90017

NANCY Y. BEKAVAC
612 South Flower Street
Los Angeles, CA 90017

Telephone: (213) 683-9100

Attorney for Amicus Curiae Los Angeles County Bar Association

PANDICK PRESS WEST COAST, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

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INTEREST OF AMICUS CURIAE

Pursuant to the written consent of the parties,[1] Amicus Curiae Los Angeles County Bar Association herewith submits its brief in support of the claims of Plaintiffs/Appellees Article III judges in the instant cases, which were consolidated by order of this Court on June 16, 1980.

The Los Angeles County Bar Association is a voluntary organization of over 16,000 lawyers, judges and law professors in the County of Los Angeles, California. It is the largest regional bar association in the United States and, among

[1] The written consent of the parties are on file with the Clerk of this Court, pursuant to Rule 36.2 of the Rules of the Supreme Court.

voluntary bar associations, is second in size only to the American Bar Association. Since its founding more than 100 years ago, the Association has had as one of its primary goals promotion of the sound administration of justice in the California and federal courts.

The Association has long maintained committees on judicial evaluation and administration, as well as other committees, both standing and special, to secure the highest quality appointments to both the California and federal courts. It has supported various legislative efforts to assure adequate judicial resources in Southern California. Accordingly, the Association has a substantial interest in assuring a just resolution by this Court of a conflict involving compensation paid to federal judges. The Association represents the bar in a metropolitan area which places increasing demands on its courts and judges, and it believes that adequate judicial compensation is vital to attracting the ablest men and women to the federal bench.

The Acts of Congress which are at issue herein have reduced judicial compensation by refusing to fund cost-of-living increases due federal judges. Moreover, the arguments advanced to justify this reduction would permit Congress to refuse to fund other forms of compensation, or any compensation at all. The Compensation Clause absolutely bars such reduction and protects all sitting federal judges from being influenced in their decisions by the possibility of such diminishment in compensation.

SUMMARY OF ARGUMENT

I.

The Association urges that 28 U.S.C. § 455 does not defeat the jurisdiction of this Court.[2] Each of the Justices is a member of both of the classes certified as plaintiffs in these cases, and

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[2] This Court has specifically requested that the parties brief the issue of "the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court." (J.A. 56a.)

therefore would otherwise be disqualified under § 455(b)(4) and (5)(i). However, each sitting Article III judge would be similarly disqualified, either as a class member of the plaintiff classes or as an interested person whose compensation would be affected by the outcome of these actions.

Because all federal courts would be closed to these litigants under strict application of § 455, this Court should apply the "rule of necessity" to hear these actions. That rule, which has been expressly adopted by this Court and was not abrogated by the adoption of § 455, is particularly applicable to cases involving judicial compensation and affecting the separation of legislative and judicial power, which would otherwise escape judicial scrutiny.

II.

The Association also argues that the 1976, 1977, 1978 and 1979 Pay Acts are unconstitutional reductions in compensation due federal judges under Article III.

The four Acts of Congress challenged herein reduce the compensation of Article III judges by denying promised increases which are "compensation" within the meaning of the Compensation Clause. This Court has previously held, and other courts have agreed, that what constitutes "compensation" includes all that is promised to a judge as payment, not merely that which is immediately due and payable. Because the Adjustment Act provides for increases automatically, it provides an upward cost-of-living adjustment as part of "that which has been promised by law for [judicial] services." *Evans v. Gore*, 253 U.S. 245, 253-4 (1920).

Accordingly, Congress' refusal to pay the adjustments which have been promised, and, in the case of the 1979 Pay Act, the refusal to continue to fund an increase which had gone into effect, reduce judicial compensation in violation of Article III. To hold otherwise would threaten the separation of the

legislative and judicial powers which was erected precisely to prevent courts from depending on the Congress for their continued subsistence. This reduction in judicial compensation under the Pay Acts is prohibited irrespective of whether the Congressional acts are found to have discriminated against federal judges or to have undermined judicial independence under the test proposed by the United States. The Government's argument that such reduction does not violate the Compensation Clause unless it "discriminates against Article III judges or undermines their independence" utterly lacks constitutional, historical or precedential support. The Association urges this Court to repudiate any such rule and to affirm the orders of the trial court.

ARGUMENT

I

ANY APPLICATION OF 28 U.S.C. § 455 WHICH WOULD DISQUALIFY THE JUSTICES OF THIS COURT IN THESE CASES WOULD DENY ARTICLE III JUDGES ACCESS TO THE COURTS AND RAISE SERIOUS QUESTIONS REGARDING THE SEPARATION OF POWERS.

The Association adopts the arguments made both by counsel for the United States and counsel for the Article III judges regarding disqualification. Both parties have argued that jurisdiction was properly laid in the district court under the Tucker Act, 28 U.S.C. § 1346 (a)(2) and in this Court under 28 U.S.C. § 1252. They argue further that although the provisions of 28 U.S.C. § 455 would apparently disqualify the district court judge and each of the Justices of this Court, application of § 455 would disqualify all current federal judges. The Association agrees that in such circumstances the district court properly invoked the "rule of necessity" to resolve the issue and that this Court should apply the same principle to these cases.

The Association wishes to add only two points to those raised by counsel for the parties.

First, because salaries for federal judges are defined as the salary set by an annual rate as increased by the Adjustment Act, any decision which determines the effective rate set by the Adjustment Act affects not only those federal judges who are class members, but also all judges appointed after the 1979 Pay Act (Pub. L. No. 96-86, 93 Stat. 656), because their initial salaries are pegged to the adjusted rate. Thus, every sitting federal judge is either a party or has a "financial interest" sufficient to disqualify him or her from these cases under 28 U.S.C. § 455(b)(4) or (5).[3]

Second, this Court may well feel, as did the Court in *Evans v. Gore*, that "we cannot but regret that its solution falls to us." 253 U.S. at 247. But the Association urges that these cases, even more than *Evans v. Gore*, raise issues critical to judicial independence from legislative pressure, no matter from what fiscal or political motivations that pressure comes.[4] If this Court fails to invoke the rule of necessity to retain jurisdiction, and if other federal judges are similarly disqualified, then § 455 would in fact deprive a class of litigants of any judicial forum. By similarly strict application, § 455 could effectively bar resort to the federal courts for virtually all cases under the Compensation

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[3] Thus, the provisions of 28 U.S.C. § 2109 are not available to remedy this Court's lack of a quorum because all of the judges of the appropriate court of appeals—the United States Court of Appeals for the Seventh Circuit—would also be disqualified under § 455(b)(4) or (5).

[4] Such issues have become more frequent subjects of litigation in federal and state courts. *See, e.g., Atkins v. United States*, 556 F.2d 1028 (1977), *cert. denied*, 434 U.S. 1009 (1978); *Foley v. Carter*, Civ. No. 79-3063 (D.D.C. Mar. 24, 1980) appeal pending, Nos. 80-1548, 80-1551 (D.C. Cir. filed May 21, 1980); *Olson v. Cory*, 26 Cal. 3d 672 (1980); *Stiftel v. Malarkey*, 384 A.2d 9 (Del. S.Ct. 1977).

Clause, cases which importantly affect judicial independence.[5] Obviously, § 455 should be construed both to preserve rights of access and this Court's ability to resolve disputes involving the separation of powers.[6]

II

THE 1976, 1977, 1978 AND 1979 PAY ACTS ARE UNCONSTITUTIONAL BECAUSE THEY DIMINISH THE COMPENSATION OF JUDGES IN VIOLATION OF ARTICLE III, SECTION 1 OF THE UNITED STATES CONSTITUTION.

Congress has enacted a compensation scheme for federal judges which provides for an annual salary composed of a base salary determined by the Federal Salary Act of 1967, as

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[5] *See Oestereich v. Selective Serv. Sys. Local Board No. 11*, 393 U.S. 233, 238 (1968). In *Atkins v. United States*, the Solicitor General conceded that such a result would raise serious due process issues. No. 75-1728, Memorandum for the United States at 8, n.5, cited in No. 79-1689, Motion to Affirm 11, n.8. *See also* Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1371-74 (1953); Redish and Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 76-81, 93-109 (1975).

[6] It has been suggested that the duty of a Justice of this Court to sit in cases where he is not disqualified may be "even stronger" than for other judges, both because there is no method to appoint a "substitute" justice and because there is no higher authority to review cases, which may be affirmed by an evenly divided Supreme Court sitting without one of its justices. *Laird v. Tatum*, 409 U.S. 824, 837 (Memorandum of Rehnquist, J. 1972). On at least one occasion, a Justice of this Court reversed his initial decision not to participate in a case in order to make up a quorum. *See North American Co. v. Sec. and Exch. Comm'n.*, 318 U.S. 750 (1943) (Chief Justice Stone took no part in decision on petition for certiorari); 320 U.S. 708 (1943) (four justices having disqualified themselves and no quorum being present, case set on special docket and proceedings postponed to await a quorum); 327 U.S. 686 (1946) (Chief Justice Stone voted with the majority).

increased by the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419 ("Adjustment Act"). That Act, enacted in 1975, provides cost-of-living increases for judges[7] at the same rates applied to General Schedule employees under the Federal Pay Comparability Act of 1970, 5 U.S.C. §§ 5301, 5305-5308 ("Comparability Act"). Yearly adjustments in salaries under the Comparability Act are mandatory, in the absence of a national emergency or economic condition affecting the general welfare. *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 601 (D.C. Cir. 1974). In times of national emergency or economic stress, the President must transmit an alternative plan adjusting salaries. That alternative plan goes into effect unless either House of Congress disapproves the alternative plan within thirty (30) days as defined in the statute. 5 U.S.C. § 5305(c)(2).

For each fiscal year since 1975, General Schedule salaries have been increased as provided for by the Comparability Act. Under the Adjustment Act, those rates are applicable to federal judicial salaries. However, in each fiscal year since 1975 the Congress has refused to appropriate funds for the recommended adjustments to federal judicial salaries. (Brief for United States at 8-13.)

The United States argues that the Legislative Branch Appropriations Acts of 1977 (Pub. L. No. 94-440, 90 Stat. 1439) ("1976 Pay Act"), 1978 (Pub. L. No. 95-96, 91 Stat. 270) ("1977 Pay Act") and 1979 (Pub. L. No. 95-391, 92 Stat. 763) ("1978 Pay Act") and Pub. L. No. 96-86, 93 Stat. 656 ("1979 Pay Act") constitutionally denied Article III judges the annual adjustment accruing to them under the Adjustment Act because: (1) at the time the 1976, 1977, and 1978 Pay Acts

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[7] The Adjustment Act specifically incorporates the requirements of the Compensation Clause by providing that the Act "shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under Section 1 of Article III of the Constitution of the United States, be diminished during such individual's continuance in office."

were enacted, the annual cost-of-living adjustments were not yet part of a judge's "compensation"; and (2) even if the 1976, 1977 and 1978 Acts diminished judicial compensation they, and the 1979 Pay Act, which the Government admits reduced judicial compensation then in effect,[8] were not unconstitutional because they did not discriminate against judges or make inroads upon judicial independence.[9]

The Government's arguments ignore the plain language of the Constitution. Congress is charged with the duty to set judicial salaries. It may set a fixed amount, an automatic formula or a discretionary formula for such compensation. But for no reason, discriminatory or otherwise, does the Constitution allow the *reduction* of a judge's salary during his or her continuance in office. Refusal to fund salary increases which are automatic, in that they are not made subject to Congressional approval or disapproval, is a diminution of salary in violation of the Constitution.

A. Article III Protects A Promised Compensation From Reduction Whether The Compensation Is A Fixed Amount Or Set By A Formula.

The Compensation Clause insulates the judiciary from future retaliation for current judicial actions: no matter how unpopular a decision is, the judge who renders it is secure in his or her position and is protected against reduction of his or her compensation. To that extent, it fulfills Hamilton's scheme:

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[8] Brief for the United States at 13.

[9] The Government also argues that, as a matter of statutory construction, the Pay Acts superseded or rescinded the increases provided for by the Adjustment Act. That argument simply rephrases the question of whether the Pay Acts are unconstitutional under Article III. If Congress is obligated to pay the increases provided under the Adjustment Act, it may neither refuse to appropriate funds nor repeal or rescind the Adjustment Act so as to diminish compensation to sitting federal judges.

> "[W]e can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter." *The Federalist*, No. 79, 531 (J. Cooke ed. 1961).

Since the Compensation Clause is designed to protect against future retaliation, it looks to what has been promised by law, and prohibits reneging on that promise.[10] In reviewing Congressional actions under the Compensation Clause, then, the issue is not whether compensation has "vested" or "accrued," as the Government would have it, but what compensation was promised.

The Court need look no further than 28 U.S.C. § 135 to find the compensation promised to district court judges.[11] That section provides for a salary composed of a base salary, determined under the Federal Salary Act,[12] as annually adjusted by the Adjustment Act: if an annual increase is given to

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[10] In *Evans v. Gore*, 253 U.S. 245, 253-54 (1920), the Court stated:

> "[A]ll [diminutions] which, by their necessary operation and effect, withhold or take from the judge a part of that *which has been promised by law for his services,* must be regarded as within the prohibition. Nothing short of this will give full effect to [Article III's] spirit and principle." (Emphasis added.)

[11] Similar provisions apply to other Article III judges and court personnel: 10 U.S.C. § 867 (Judges of Court of Military Appeals); 11 U.S.C. § 68 (Referees in bankruptcy); 26 U.S.C. § 7443 (Judges of the Tax Court); 28 U.S.C. § 5 (Chief and Associate Justices of the Supreme Court); *id.* § 44 (Circuit judges); *id.* § 173 (Judges, Court of Claims); *id.* § 213 (Judges, Courts of Customs and Patent Appeals); *id.* § 252 (Judges, Customs Court); *id.* § 603 (Director and Deputy Director of Administrative Office of the U.S. Courts); *id.* § 753 (Court reporters, district court); *id.* § 792 (Commissioners, Court of Claims).

[12] Postal Revenue and Federal Salary Act of 1967, Pub.L.No. 90-206, Title II, Section 225(a)-(k), 81 Stat. 642-645, 2 U.S.C. §§ 351-361.

General Schedule employees, as mandated by the Comparability Act, a comparable increase goes into effect for district court judges.

Congress has provided that judicial compensation includes a cost-of-living increase—the "adjustment" is therefore "compensation" within the meaning of Article III. Thus, Congress' refusal to fund those increases is, for constitutional purposes, equivalent to refusal to fund judicial salaries at all.

Furthermore, for the purposes of Article III analysis, the *form* of the promised compensation is irrelevant—whether a fixed amount or an amount set by a formula to determine future salary.[13] The Government's basic argument is that because the formula adopted for judicial compensation depends on a future variable which cannot be determined in advance (the General Schedule salary increase under the Comparability Act), federal judges "have only an expectancy that they will receive the anticipated adjustment." (Brief for the United States at 53.) But the fact that the increases depend on a variable which cannot be determined in advance does not make them any less protected by Article III.

This principle was adopted in the first reported decision under Article III. In that case, the Circuit Court of Appeals for the District of Columbia held that an act of Congress which abolished fees charged by federal justices of the peace violated the Compensation Clause. *United States v. More*, 3 Cranch 159, 160 n. 1 (D.C. Cir. 1803). Congress had established federal justices of the peace in the District of Columbia pursuant to Article III and had provided for their payment by fees paid for services when those services were rendered. Congress then abolished the fee schedule. In a criminal action against a justice of the peace for charging a fee for his services,

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[13] The United States concedes the proposition that there is no meaningful distinction, for purposes of Article III analysis, between a liquidated or sum-certain increase and an increase based on a formula. (Brief for the United States at 55-56 n.1).

the circuit court held that the compensation scheme could not be diminished during the tenure of judges who took office when the schedule was in effect. Therefore, the Act of Congress abolishing the service fees did not affect sitting justices of the peace. The court explicitly rejected the argument that the fees were not within the protection of the Compensation Clause because the time of payment was not stated and held that "if a [federal judge's] compensation has once been fixed by law, a subsequent law for diminishing that compensation (*a fortiori* for abolishing it) cannot affect that [federal judge] during his continuance in office." 3 Cranch at 160 n. 1. In *More*, the judge's future compensation for services was contingent on future performance of services. Whether or in what amount those services were rendered could not be foreseen, just as the amount or existence of Adjustment Act increases cannot be predicted in advance. Yet the court protected the fee schedule in *More* against any future reduction during affected judges' tenure.

A statute analogous to the Adjustment Act and providing for automatic adjustments in salary has recently been reviewed by the California Supreme Court in *Olson v. Cory*, 26 Cal.3d 672 (1980). The California statute governing judges' salaries provided that the base salary of each judge would be increased by the percent increase in the California consumer price index.[14] In 1976, the legislature placed a limit on these cost-of-living increases. Judges and judicial pensioners brought suit to declare the limitation unconstitutional under a section of the California Constitution which provided: "Salaries of elected state officers may not be reduced during their term of office."[15]

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[14] *See* Cal. Gov. Code § 68203 (1976), which, prior to amendment, provided in pertinent part:

> "[O]n September 1 of each year . . . the salary of each justice and judge . . . shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year." (Stats. 1969, ch. 1507, § 1.)

[15] *See Olson v. Cory*, 26 Cal.3d 672, 683-84 (1980).

The California Supreme Court held that the statute setting salaries included annual cost-of-living increases as a part of each salary. Any limit on such increases was held to be a reduction in salary and was therefore unconstitutional.[16] *See also Stiftel v. Malarkey*, 384 A.2d 9, 15-16 (Del. Sup. Ct. 1977) (salary increases made pursuant to a formula cannot be revoked once they are granted to state officers whose salary or emoluments may not be diminished during their tenure).

Like the California statute interpreted in *Olson v. Cory*, the Adjustment Act provides for an automatic annual adjustment of judicial salaries.[17] In *Olson v. Cory*, the increase was set by

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[16] The Government has suggested that this Court "look to the opinion of the California Court of Appeals as the better reasoned and more persuasive discussion." (Brief for the United States at 55 n.47.) However, under well-settled California law, the opinion of the Court of Appeals ceased to have any legal effect when the California Supreme Court granted a hearing to review the decision. The Court of Appeals opinion will not appear in the bound official reports. "The opinion and decision . . . by our order of transfer have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed." *Knouse v. Nimocks*, 8 Cal.2d 482, 483, 66 P.2d 438 (1937).

[17] However, unlike the California statute, the Comparability Act to which the Adjustment Act refers does provide a legislative "escape" hatch: if there is a "national emergency or economic condition affecting the general welfare," the President may present an alternative to the mandatory adjustment. *See National Treasury Employees Union v. Nixon*, 492 F.2d 587, 601 (D.C. Cir. 1974) (in absence of submission of an alternative plan to Congress within time prescribed, the President has a non-discretionary duty to adjust federal workers' pay). If an alternative plan is presented by the President to Congress, either House may disapprove the plan by passing a resolution within thirty (30) days. 5 U.S.C. § 5305(c)(2). After such disapproval, the President must submit another alternative plan. In August 1979, for example, the President's pay agent recommended a 10.41% raise under the Comparability Act. However, because of the consequences of severe inflation, the President submitted an alternative plan calling for a 7% increase. Neither House of Congress disapproved the 7% increase within the time provided by the Comparability Act, and the 7% raise went into effect on October 1, 1979.

the consumer price index; for federal judges it is set by the rate increase for General Schedule employees under the Comparability Act.

As the reasoning of *More* and *Olson v. Cory* makes clear, a formula for judicial compensation is not entitled to any less protection than is a fixed salary. Increases under the Adjustment Act are part of judges' "compensation" and may not be withheld.

B. Article III Requires That Compensation Schemes Not Be Altered To Reduce Compensation During The Tenure Of Any Sitting Federal Judge.

The Government argues that holding that Congress cannot rescind automatic increases under the Adjustment Act would "unduly limit the constitutional province of Congress" and "might serve to inhibit innovation and experimentation" (Brief for the United States at 58.) That argument simply ignores the Compensation Clause. The precise purpose of Article III, cl. 1 is to limit Congressional power. Article III does not command Congress to choose any particular method or form of providing for judicial compensation. It merely provides that once a method is chosen, compensation may not be diminished during the tenure of a judge who takes office under that compensation scheme.

The Government correctly contends that under the holdings below Congress could not alter judicial compensation "in any manner that would afford sitting Article III judges a lesser salary than they would receive pursuant to the annual operation of the Adjustment Act." (Brief for the United States at 58.) Far from demonstrating error, that is exactly the goal of Article III. In Hamilton's words:

> "It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to day, might in half a century

become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; *yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.* A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation." *The Federalist*, No. 79, 531-32 (J. Cooke ed. 1961) (emphasis added).

The Compensation Clause does not impose an affirmative duty on Congress to raise judicial salaries.[18] However, it does act as a "one-way ratchet" so that any changes in judicial salaries may only increase compensation for judges in office. Further, once a stream of compensation is established, it may not be diminished as to judges who took office under that particular compensation scheme.[19]

The Government is clearly wrong in suggesting that the opinions below forever lock Congress into the current scheme governing judges' compensation. Congress may enact a new scheme for sitting judges so long as it does not diminish the compensation to which they are currently entitled, and Congress may enact any system it chooses for judges appointed after the new system became effective.[20]

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[18] *See Atkins v. United States*, 556 F.2d 1028, 1048 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978); Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308 (1976).

[19] *See Booth v. United States*, 291 U.S. 339 n.38 (1934).

[20] In *Olson v. Cory*, the California Supreme Court found that the legislature's amendment of the compensation scheme, although unconstitutional as to existing judges, was binding on judges taking office after the amendment became effective. 26 Cal.3d 672 (1980). Similarly, in *United States v. More*, 3 Cranch 159, 160 n. 1 (D.C. Cir. 1803), the court of appeals was careful to limit its holding that the schedule of fees for the services of federal justices of the peace did not necessarily apply to justices appointed after a new compensation scheme was enacted.

The principle that changes in judicial compensation may constitutionally apply to future judges, although ineffective for sitting judges, is consistent with cases decided by this Court. In *Evans v. Gore*, 253 U.S. 245 (1920), the Court ruled that a federal judge's salary could not be taxed under income tax statutes passed after his appointment because such a tax would be an unconstitutional diminution in salary. In *Miles v. Graham*, 268 U.S. 501 (1925) the Court held that even those judges appointed after the 1919 effective date for the tax statute could not be taxed. However, fourteen years later, in *O'Malley v. Woodrough*, 307 U.S. 277 (1939) the Court, in an opinion by Justice Frankfurter, overruled *Miles*. The compensation of any federal judge appointed after the passage of the Revenue Act of 1932 was deemed subject to income taxes. The Court in *O'Malley* specifically declined to consider the application of the taxing statute to judges who took office before the passage of the Act.[21] Further, although *Miles* was overruled, the Court did not overrule the *Evans* holding that judges were not liable under tax statutes enacted after they assumed office.[22]

The Supreme Court cases reviewed above and the reasoning of the recent California and Delaware cases support the conclusion that if Congress wishes to eliminate the annual adjustment to federal judicial salaries as provided by the Adjustment Act, it may do so, but only as to judges appointed after the provision is eliminated. To avoid the cost-of-living increases under the Adjustment Act for future judges, any annual adjustment can be made contingent on Congressional approval.[23]

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[21] 307 U.S. at 282.

[22] At least one circuit court interpreted this series of cases as protecting judges appointed prior to the taxing statutes, but not those judges taking office after the income tax statutes became effective. *See Baker v. Commissioner*, 149 F.2d 342, 343 (4th Cir.), *cert. denied*, 326 U.S. 746 (1945).

[23] It is not clear that there is any constitutional bar to such proposals. This Court has twice upheld state laws which created different rates of pay among state court judges against challenges

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Current judges are not the beneficiaries of an uncontrolled and unreasonable compensation scheme. In fact, the judges under the present system are simply partially protected from decreases in the real value of their salaries, just as are other federal employees under the Comparability Act. Upholding federal judges' rights to the mandatory annual adjustment provided by the Adjustment Act fulfills Article III's purposes and does not lock Congress into any particular compensation scheme for future federal judges.

C. The Compensation Clause Prohibition Against Reduction Of Compensation Does Not Require Proof Of Discrimination Against The Judiciary.

Contrary to the Government's argument, discriminatory intent to undermine judicial independence is not necessary to violate the Compensation Clause. Adoption of such a standard would radically alter existing law and undermine the protections of the Compensation Clause. The Government's interpretation subverts the purpose of Article III: namely, to preserve the courts, insofar as possible, from the influence of the executive and legislative branches. To that end, a judge is made secure in his or her position for life, and a judge's compensation may not be diminished during his or her tenure in that office.

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based on the due process and equal protection clauses of the Federal Constitution. *See Kavanagh v. Brown*, 206 F.Supp. 479 (E.D. Mich.), *aff'd*, 371 U.S. 35 (1962) (state constitution prevented any increase during judges' term in office; statute raising supreme court justices' salaries therefore applied only to new appointees. Court held differential between rates not violative of due process or equal protection). *See also, Ohio Municipal Judges Ass'n v. Davis*, 411 U.S. 144 (1973) (increases in pay during terms of office for judges of Supreme Court and courts of appeals and of common pleas, with no increase for municipal and county judges, did not violate equal protection).

The Government argument virtually ignores the historic experience which led the Constitutional Convention to separate Article III judges from all other federal officeholders. One of the great causes of the rebellion which created the United States was that the King of Great Britain had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Declaration of Independence, quoted in *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933). In fashioning governments for the several states, the Founding Fathers had experimented with several formulas for judicial independence.[24] Finally, in Article III they agreed upon both life tenure and on non-diminishment of compensation during that tenure. As this Court recognized in *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939), the purpose of Article III was to protect judges "in their particular function in government." Thus, Article III removes from the legislative power the ability to innovate or experiment with compensation of judges in office, lest that tinkering influence the decisions of those judges.

Statutory and constitutional arguments which may apply to compensation claims of other federal employees are not necessarily relevant to Compensation Clause issues in light of the critical importance of guaranteeing "the complete independence of the courts of justice." *Id.* at 531. Thus, the fact that Article III requires the funding of cost-of-living increases pursuant to the Adjustment Act is consistent with the purposes of the Compensation Clause because it removes the discretionary power of the legislature over compensation for sitting judges.

The clear requirement of the Constitution is that any legislation which has the effect of reducing a "judge's salary as such"[25] is forbidden because it may tend to compromise his independence. That the challenged Pay Acts were not intended to punish the federal judiciary, that they were not formulated to

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[24] *See The Federalist*, No. 79, 533 (J. Cooke ed. 1961).

[25] *Evans v. Gore*, 253 U.S. 245, 265 (1920) (Holmes, J., dissenting).

bring about judicial dependence does not validate them, for innocent actions may have unintended and damaging consequences. Although the Pay Acts do not overtly threaten the judiciary, the withdrawal of promised compensation at a time of high inflation poses precisely the dangers which Article III was designed to prevent: a judiciary dependent on Congress for payment of their promised salaries. From our own colonial past through contemporary foreign examples, history teaches that demoralized and dependent judges are ill-equipped to withstand attacks on their powers or to preserve the rights of citizens.

Alexander Hamilton wrote in supporting the adoption of Article III that permanent tenure in office is the greatest safeguard of independence in the judiciary and that fixed compensation was the second most important safeguard. Failure to assure adequate, fixed compensation may dilute the independence of the judiciary by, on the one hand, restricting judicial office to those of independent wealth or without family obligations and, on the other hand, increasing pressures on the judiciary to seek legislative relief.[26] Thus, the refusal to fund promised compensation threatens judicial independence irrespective of the intention of Congress, and it falls under the prohibition of Article III.

The Government's argument for requiring discriminatory intent rests on a misreading of *O'Malley v. Woodrough*, 307 U.S. 277 (1939). In that case the Supreme Court reversed a judgment that the Revenue Act of 1932 was unconstitutional insofar as it provided for taxation of the salary of federal judges as income. *O'Malley* held that imposition of an income tax on judges' salaries was not a violation of the Compensation Clause where such taxation constituted merely a recognition that the federal judges' "particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Id.* at 282. Thus, the Court in *O'Malley* rightly looked to the "great historic

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[26] *See* Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308 (1976).

experience" on which the Compensation Clause was built and analyzed the case before it in terms of whether a judge's "particular function in government" should generate immunity from the decrease in compensation under challenge. Judges, as citizens, were subject to the same burdens borne by their fellow citizens. The common duties of citizenship, the Court held, did not make inroads upon the independence of the judiciary.[27]

Unfortunately, the Government has expanded *O'Malley's* analysis to erect a virtually insurmountable barrier to any challenges to reduction of judicial compensation.

Nothing in *O'Malley* even remotely suggests that specific intent to discriminate against judges is necessary to violate the Compensation Clause. *O'Malley* says nothing about evidence of "antagonism against the judiciary" or an "attack on judicial independence."[28] (Brief for the United States at 64.) As the Brief Amicus Curiae on Behalf of the American Bar Association convincingly demonstrates, such requirements of proof would be impossible to meet in the ordinary case and are irrelevant to the purpose of the Compensation Clause: to guarantee that federal judges "might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which as master of the purse, would otherwise hold the power to reduce their means of support." *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933). *See* Brief of Amicus Curiae American Bar Association at 19-20.

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[27] This category of permissible burdens on judicial compensation is narrow, however. Judges are not constitutionally subject to decreases in compensation merely because such diminution affects a large class of persons, but only where the financial burden comprises a common duty of citizenship. For example, in *Booth v. United States*, 291 U.S. 339 (1934), this Court ruled unconstitutional a law reducing retired judges' salaries by 15%, even though all other federal employees' salaries were reduced by the same rate.

[28] *O'Malley* in fact involved an express attempt by Congress to diminish judicial salaries by making them subject to the income tax statutes. Despite this clear "discriminatory" intent to bring judges under the statute, the diminution was held constitutional because it arose from a judge's duty as a citizen and affected all citizens, so judges were therefore subject to it as well.

CONCLUSION

For the foregoing reasons, the judgments of the district court should be affirmed.

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Respectfully submitted,

NANCY Y. BEKAVAC

Attorney for Amicus Curiae
Los Angeles County
Bar Association

Of Counsel:

Joseph D. Mandel
Richard M. Coleman
Roy H. Aaron
Gavin Miller
Georgia Franklin

Officers of the
Los Angeles County
Bar Association

Munger, Tolles & Rickershauser